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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
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11 BLAKE WINGLE,

12 Plaintiff,

13 vs.

14 UNITED STATES,

15 Defendant.
16 _____/

CASE NO. CV F-05-00160 REC LJO

**ORDER TO: (1) VACATE FINDINGS AND
RECOMMENDATIONS TO DISMISS
ACTION; AND (2) TO DISMISS
COMPLIANT WITH LEAVE TO AMEND**

17 **BACKGROUND**

18 On February 4, 2005, pro se plaintiff Blake Wingle (“plaintiff”) filed a document entitled
19 “Petition: for Protection of Rights, etc.” (“complaint”). Based on plaintiff’s papers, this Court construes
20 plaintiff’s complaint to allege errors conducted during a 26 U.S.C. § 6330 (“section”) administrative
21 hearing conducted on December 14, 2004. This Court issued April 22, 2005 findings and
22 recommendations to dismiss this action. On May 5, 2005, plaintiff filed papers to clarify his positions.
23 As such, this Court will readdress plaintiff’s complaint.

24 **DISCUSSION**

25 **Standards For Screening**

26 “A trial court may dismiss a claim sua sponte under Fed.R.Civ.P. 12(b)(6). . . . Such dismissal
27 may be made without notice where the claimant cannot possibly win relief.” *Omar v. Sea-Land Service,*
28 *Inc.*, 813 F.2d 986, 991 (9th Cir. 1987); *see Wong v. Bell*, 642 F.2d 359, 361-362 (9th Cir. 1981). Sua

1 sponte dismissal may be made before process is served on defendants. *Neitzke v. Williams*, 490 U.S.
2 319, 324 (1989) (dismissals under 28 U.S.C. § 1915(d) are often made sua sponte); *Franklin v. Murphy*,
3 745 F.2d 1221, 1226 (9th Cir. 1984) (court may dismiss frivolous in forma pauperis action sua sponte
4 prior to service of process on defendants).

5 Since plaintiff proceeds in forma pauperis, this Court, notwithstanding any filing fee that may
6 have been paid, shall dismiss a case at any time if the Court determines the action is frivolous, malicious,
7 fails to state a claim on which relief may be granted, or seeks monetary relief against an immune
8 defendant. See 28 U.S.C. § 1915(e); 2 Schwarzer, Tashima & Wagstaffe, California Practice Guide:
9 Federal Civil Procedure Before Trial (2005) Attacking the Pleadings, para. 9:226.1, pp. 9-65. A court
10 need not accept as true factual allegations in in forma pauperis complaints and may reject “completely
11 baseless” allegations, including those which are “fanciful,” “fantastic” or “delusional.” *Denton v.*
12 *Hernandez*, 504 U.S. 25, 32, 112 S.Ct. 1728, 1733 (1992).

13 A claim is legally frivolous when it lacks an arguable basis either in law or fact. *Neitzke v.*
14 *Williams*, 490 U.S. 319, 325 (1989); *Franklin v. Murphy*, 745 F.2d 1221, 1227-1228 (9th Cir. 1984). A
15 frivolous claim is based on an inarguable legal conclusion or a fanciful factual allegation. *Neitzke*, 490
16 U.S. at 324. A federal court may dismiss a claim as frivolous where it is based on an indisputably
17 meritless legal theory or where the factual contentions are clearly baseless. *Neitzke*, 490 U.S. at 327.

18 The test for maliciousness is a subjective one and requires the court to “determine the . . . good
19 faith of the applicant.” *Kinney v. Plymouth Rock Squab Co.*, 236 U.S. 43, 46 (1915); see *Wright v.*
20 *Newsome*, 795 F.2d 964, 968, n. 1 (11th Cir. 1986). A lack of good faith is found most commonly in
21 repetitive suits filed by plaintiffs who have used the advantage of cost-free filing to file a multiplicity
22 of suits. A complaint is malicious if it suggests an intent to vex defendants or abuse the judicial process
23 by relitigating claims decided in prior cases. *Crisafi v. Holland*, 655 F.2d 1305, 1309 (D.C. Cir. 1981);
24 *Phillips v. Carey*, 638 F.2d 207, 209 (10th Cir. 1981); *Ballentine v. Crawford*, 563 F.Supp. 627, 628-629
25 (N.D. Ind. 1983); cf. *Glick v. Gutbrod*, 782 F.2d 754, 757 (7th Cir. 1986) (court has inherent power to
26 dismiss case demonstrating “clear pattern of abuse of judicial process”). A lack of good faith or malice
27 also can be inferred from a complaint containing untrue material allegations of fact or false statements
28 made with intent to deceive the court. See *Horsey v. Asher*, 741 F.2d 209, 212 (8th Cir. 1984).

1 A complaint, or portion thereof, may be dismissed for failure to state a claim if it appears beyond
 2 doubt that plaintiff can prove no set of facts in support of the claim or claims that would entitle him to
 3 relief. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (citing *Conley v. Gibson*, 355 U.S. 41,
 4 45-46 (1957)); *see also Palmer v. Roosevelt Lake Log Owners Ass’n*, 651 F.2d 1289, 1294 (9th Cir.
 5 1981). “[W]hen a federal court reviews the sufficiency of a complaint, before the reception of any
 6 evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether
 7 a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support
 8 claims.” *Scheurer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 1688 (1974); *Gilligan v. Jamco Development*
 9 *Corp.*, 108 F.3d 246, 249 (9th Cir. 1997).

10 The complaint reflects pleading deficiencies to prevent plaintiff from offering evidence to
 11 support claims raised in the complaint.

12 **Pleading Deficiencies**

13 F.R.Civ.P. 8 establishes general pleading rules and provides in pertinent part:

14 (a) Claims for Relief. A pleading which sets forth a claim for relief . . . shall
 15 contain (1) a short and plain statement of the grounds upon which the court’s jurisdiction
 16 depends, unless the court already has jurisdiction and the claim needs no new grounds
 17 of jurisdiction to support it, (2) a short plain statement of the claim showing that the
 18 pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader
 19 seeks.

17 . . .

18 (e) Pleading to be Concise and Direct; Consistency.

19 (1) Each averment of a pleading shall be simple, concise and direct.
 20

21 A pleading may not simply allege a wrong has been committed and demand relief. The
 22 underlying requirement is that a pleading give “fair notice” of the claim being asserted and the “grounds
 23 upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47-48, 78 S.Ct. 99, 103 (1957); *Yamaguchi v.*
 24 *United States Department of Air Force*, 109 F.3d 1475, 1481 (9th Cir. 1997). Although a complaint need
 25 not outline all elements of a claim, “[i]t must be possible . . . for an inference to be drawn that these
 26 elements exist.” *Walker v. South Central Bell Telephone Co.*, 904 F.2d 275, 277 (5th Cir. 1990); *Lewis*
 27 *v. ACB Business Service, Inc.*, 135 F.3d 389, 405-406 (6th Cir. 1998). Despite the flexible pleading
 28 policy of the Federal Rules of Civil Procedure, a complaint must give fair notice and state the elements

1 of the claim plainly and succinctly. *Jones v. Community Redev. Agency*, 733 F.2d 646, 649 (9th Cir.
2 1984). A plaintiff must allege with at least some degree of particularity overt facts which defendant
3 engaged in to support plaintiff's claim. *Jones*, 733 F.2d at 649.

4 In his papers filed May 5, 2005, plaintiff complains of the "IRS rushing him off to collections
5 before he received a face to face examination interview where the Plaintiff could, point out to the
6 examiner any amounts included in the return which are not taxable." Plaintiff's complaint alleges,
7 among other things:

- 8 1. Plaintiff is entitled to "an opportunity to attend a face to face examination hearing with
9 IRS Examination personnel."
- 10 2. "The IRS's administrative record evidences that Plaintiff timely requested, pre-collection
11 examination hearings.
- 12 3. "The IRS Appeals Officers ignored Petitioner's evidence that the IRS LACKED
13 SUBJECT MATTER JURISDICTION and therefore it was inappropriate for the IRS to
14 proceed to collection . . ."
- 15 4. "By the Appeals Officers NOT verifying the administrative record, they were NOT
16 familiar with the evidence I presented that is and was a part of the IRS administrative
17 record, so no meaningful discourse was able to take place."
- 18 5. "The Appeals Officers ignored that the examination hearing to determine the underlying
19 liability had NOT been afforded Petitioner."

20 The complaint does not pray for relief except for "leave to amend this Petition when Petitioner
21 obtains counsel knowledgeable in Tax and Revenue law, or obtains new facts."

22 Section 6330 generally provides that the Internal Revenue Service ("IRS") cannot proceed with
23 tax collection by levy on a taxpayer's property until the taxpayer has been given notice of and the
24 opportunity for an appeals Officer due process hearing, and if dissatisfied, with judicial review of such
25 administrative determination. Section 6330(c) addresses matters considered at an appeals officer
26 hearing:

27 In the case of any hearing conducted under this section –

28 (1) Requirement of investigation. – The appeals officer shall at the

1 hearing obtain verification from the Secretary that the requirements of
2 any applicable law or administrative procedure have been met.

3 At the appeals officer hearing, a taxpayer may raise “any relevant issue relating to the unpaid tax or
4 proposed levy, including . . . challenges to the appropriateness of collection actions.” 26 U.S.C. §
5 6330(c)(2)(A)(ii). Section 6330(c)(2)(B) permits a taxpayer to “raise at the hearing challenges to the
6 existence or amount of the underlying tax liability for any tax period if the person did not receive any
7 statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute
8 such tax liability.” Section 6330(c)(3) sets forth criteria for an appeals officer to consider, including
9 verification that requirements of applicable law and administrative procedure have been met. Section
10 6330(d) permits an appeal within 30 days of the appeals Officer’s determination to a United States
11 district court if the United States Tax Court lacks jurisdiction.

12 Based on plaintiff’s papers filed May 5, 2005, this Court construes plaintiff’s complaint to allege
13 errors of an appeals officer’s determination following a December 14, 2004 due process hearing. The
14 complaint’s allegations regarding the appeals officer fail to state a claim. The complaint fails to allege
15 Section 6330(c) discrepancies to permit this Court to proceed with review. The complaint fails to even
16 hint at the appeals officer’s determination. The complaint make sweeping comments without supporting
17 facts or substance. The complaint fails to state facts that this Court, rather than the United States Tax
18 Court, has jurisdiction to satisfy F.R.Civ.P. 8(a)(1). The complaint does not adequately identify grounds
19 for relief to satisfy F.R.Civ.P. 8(a)(2). The complaint fails to articulate particular relief sought by
20 plaintiff. The pleading deficiencies prevent this Court from proceeding on plaintiff’s complaint.

21 **Attempt At Amendment**

22 Plaintiff is granted an opportunity to attempt to amend his complaint to cure deficiencies.
23 Plaintiff is further admonished that this Court’s Local Rule 15-220 requires an amended complaint to
24 be complete in itself without reference to any prior pleading. As a general rule, an amended complaint
25 supersedes the original complaint. *See Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). After the filing
26 of an amended complaint, the original pleadings serves no further function. Thus, in an amended
27 complaint, each claim and involvement of each defendant must be sufficiently alleged.

28 ///

CONCLUSION AND ORDER

For the reasons discussed above, this Court:

1. VACATES its April 22, 2005 findings and recommendations to dismiss this action;
2. DISMISSES plaintiff's complaint, filed February 4, 2005, and GRANTS plaintiff leave to amend;
3. ORDERS plaintiff, no later than June 3, 2005, to file an amended complaint to comply with this order; and
4. **Admonishes plaintiff that failure to file an amended complaint in compliance with this order will result in a recommendation to dismiss this action for failure to obey a court order.**

IT IS SO ORDERED.

Dated: May 12, 2005
66h44d

/s/ Lawrence J. O'Neill
UNITED STATES MAGISTRATE JUDGE